CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE CHAPTER 22, ARTICLE 11

TO: Burns Motor Freight, Inc.
John Burns, President
P.O. Box 149
Marlinton, WV 24954-0149

DATE: 9 September 2016

ORDER NO.: _____

INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management ("Director"), under the authority of West Virginia Code § 22-11-1 *et seq.*, to Burns Motor Freight, Inc. ("Burns").

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. Burns operates a tractor trailer fueling facility and maintenance garage located near Beverly, Randolph County, West Virginia, Burns was issued WV/NPDES Water Pollution Control Permit No. WV0111457, Registration No. WVG610596, on 1 April 2009.

2. On 28 May 2012, Randolph County 911 reported a leak of diesel fuel from the Burns facility into the Tygart Valley River, which resulted in strong odors and an oily sheen on the river.

3. It was determined by Burns that an underground fuel line connecting an aboveground diesel storage tank to a fuel island on Burns' property ruptured causing the release of diesel fuel.

4. On 31 May 2012, in response to the 911 report West Virginia Department of Environmental Protection ("WVDEP") personnel conducted an investigation at the Burns facility. During the investigation, the following deficiencies were observed:

a. The accidental diesel fuel leak on Burns' property created conditions not allowable in waters of the State by causing oily slicks in an unnamed tributary of the Tygart Valley River, a violation of West Virginia Code of State Rules § 47-2-3.2.a. As a result, WVDEP issued Notice of Violation (NOV) W12-42-075-2135 to Burns.

b. Burns failed to immediately take any and all measures necessary to contain the leak, a violation of West Virginia Code of State Rules § 47-11-2.5. As a result, WVDEP issued NOV W12-42-078-2135 to Burns.

c. Burns failed to take any and all measures necessary to clean up, remove, and otherwise render the leak harmless to the waters of the State, a violation of West Virginia Code of State Rules § 47-11-2.5.a. As a result, WVDEP issued NOV W12-42-078-2135 to Burns.

5. From 6 June 2012 through 18 July 2012, WVDEP personnel observed an oily slick on the unnamed tributary of the Tygart Valley River, a violation of West Virginia Code of State Rules § 47-2-3.2.a.

6. A meeting between WVDEP and Burns was held on 26 November 2012 to discuss the terms and conditions of a proposed prior Consent Order (7721). During the meeting, Burns provided documentation indicating that remediation of the spill had begun. Burns agreed with WVDEP that further delineation of the spill was necessary to determine the extent of the contamination.

7. On 31 January 2013, Burns provided documentation that demonstrated Burns took measures to prevent further accidental releases at its facilities in Beverly and Marlinton by installing solenoid valves and fiberglass double wall piping for its Aboveground Storage Tank systems.

8. WVDEP and Burns agreed to the entry of Consent Order ("CO") 7721 on 4 March 2013. CO 7721 required Burns to do two things:

a. "Immediately take all measures to initiate compliance with all pertinent laws and rules" and

b. submit to WVDEP, within 30 days of the effective date of CO 7721, a proposed "plan of corrective action and schedule, outlining action items and completion dates for how and when Burns will achieve compliance with all pertinent laws and rules."

See, CO 7721 at 2.

9. Burns submitted remediation proposals to the WVDEP for additional remediation work, but the WVDEP rejected those plans as unsuitable.

10. WVDEP filed suit against Burns on 22 September 2015, alleging violation of CO 7721, violations of the West Virginia Water Pollution Control Act, violations of the West Virginia Code of State Rules provisions cited above, public nuisance, abnormally dangerous activity pursuant to *Rylands v. Fletcher*, L.R. 1 Ex. 265 (1866) and its progeny.

11. WVDEP's suit demanded a judgment that forces Burns to comply with CO 7721 by requiring submission of a corrective action plan and schedule of compliance approvable by WVDEP, payment of additional civil penalties, permanent injunctive relief, statutory penalties of up to $25,000.00 per day, per violation, and costs and attorney fees.

12. WVDEP and Burns have agreed to resolve the claims contained in WVDEP's suit in exchange for Burns' agreement to remediate the site in a manner set by the WVDEP and by a timetable established by the WVDEP.

13. Burns and its agents have performed soil and water sampling at the site since the 2012 leak. The most recent quarterly water samplings of six permanent groundwater monitoring wells and the stream on the subject property have revealed that DRO concentrations were below 1.0 mg/l or non-detect. The most recent quarterly water sampling of six groundwater monitoring sumps on the site has revealed that DRO concentrations were slightly above 1.0 in two of the sumps while the remaining four sumps tested below 1.0 mg/l or non-detect. While it appears that the waterways of the State are not currently impacted by the diesel leak, soil sampling has revealed that DRO concentrations in the soil are higher than acceptable thresholds. Therefore, additional remediation of the Colonial Millworks real estate is necessary.

14. Burns agrees to remediate the Colonial Millworks real estate to DRO concentrations in the soil and water that are acceptable to the WVDEP. Burns will implement a remediation method that is acceptable to the WVDEP. After implementation of the remediation method, the parties agree to discuss the possibility of the site entering the Voluntary Remediation Program if the results of the remediation reveal that the site may be a good candidate for participation in that program. However, the civil action brought by Colonial Millworks against Burns is currently set to commence on September 14, 2016. In the event that the jury or court awards Colonial money damages for the cost of remediation, and in the event that sum is paid to Colonial Millworks, then the burden to remediate the Colonial Millworks property shall shift to Colonial Millworks, and Burns will be absolved of any and all responsibility to remediate the Colonial Millworks' property.

15. With regard to the Burns real estate, Burns agrees to a two-step course of action:

a. First, Burns shall prepare a complete site characterization. This document will definitively attempt to identify the precise amount of petroleum released from Burns' underground diesel fuel line, identify why the leak occurred, and predict the most likely area impacted and the extent of the impact. Soil samples from the fill area will be collected. Simple direct push methods can be used to collect samples and EPA Test Method 8015 Total Petroleum Hydrocarbons – Diesel Range Organics should be used, as it is appropriate for identifying petroleum that has not yet degraded into its constituents. Groundwater depth, flow direction, and velocity will be obtained by installing wells in a triangular formation and taking measurements. Samples of the groundwater should be tested for evidence regarding whether petroleum has leached into the groundwater.

b. Second, Burns shall, working closely with WVDEP, develop a remediation plan.

Accordingly, the first remedial step should be to remove soils saturated or affected by the petroleum leak. The parties agree to discuss whether the soils should be taken to a proper disposal facility off-site or whether the soils may be moved to another location on the Burns' property and become part of a properly constructed bio-pile remediation system. Once Burns has removed the contaminated soils, confirmation samples should be taken and tested using Method

8015. These samples should be collected from the walls and floor of the excavation. However, the parties acknowledge that the complete site characterization referred to in Paragraph 15.a. above may reveal that other remediation methods may be effective at this site and may be more prudent or practical to implement than excavation. Therefore, the parties agree to review the complete site characterization and agree upon a final remediation plan for this site. Furthermore, the parties also agree to discuss the possibility of the site entering the Voluntary Remediation Program, if the complete site characterization reveals that the site may be a good candidate for participation in that program.

Next, a monitoring schedule will be established. Water samples from the wells will be tested at least quarterly. Once petroleum constituents are not detected for six consecutive sampling events, the Groundwater Program may recommend the director issue a No Further Action Required letter. Should tests show minor or limited impact, the Groundwater Program would, at a minimum, expect Burns to carry on with a Monitored Attenuation Plan. If the Monitored Attenuation Plan is successful, Burns and WVDEP will continue to monitor for six additional events, at which time, once petroleum constituents are not detected for six consecutive sampling events, the Groundwater Program may recommend the director issue a No Further Action Required letter.

16. Burns is responsible for the costs and expenses of remediation of both its property and the Colonial property. However, the civil action brought by Colonial Millworks against Burns is currently set to commence on September 14, 2016. In the event that the jury or court awards Colonial money damages for the cost of remediation, and in the event that sum is paid to Colonial Millworks, then the burden to remediate the Colonial Millworks property shall shift to Colonial Millworks, and Burns will be absolved of any and all responsibility to remediate the Colonial Millworks' property.

17. To the extent that this Consent Order conflicts with the terms and conditions of the CO 7721, this Consent Order shall supersede CO 7721, with the exception of the civil administrative penalty levied against Burns in Burns Consent Order No. 7721 which has been previously paid in full.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with West Virginia Code § 22-11-1 *et seq.*, it is hereby agreed between the parties and ORDERED by the Director:

1. Burns agrees to remediate the Colonial Millworks real estate to DRO concentrations in the soil and water that are acceptable to the WVDEP. Burns will implement a remediation method that is acceptable to the WVDEP. After implementation of the remediation method, the parties agree to discuss the possibility of the site entering the Voluntary Remediation Program if the results of the remediation reveal that the site may be a good candidate for participation in that program. However, the civil action brought by Colonial Millworks against Burns is currently set to commence on September 14, 2016. In the event that the jury or court awards Colonial money damages for the cost of remediation, and in the event that sum is paid to Colonial Millworks, then the burden to remediate the Colonial Millworks property shall shift to

Colonial Millworks, and Burns will be absolved of any and all responsibility to remediate the Colonial Millworks' property.

2. With regard to the Burns real estate, Burns will complete the following:

a. First, Burns shall prepare a complete site characterization. This document will definitively attempt to identify the precise amount of petroleum released from Burns' underground diesel fuel line, identify, why the leak occurred, and predict the most likely area impacted and the extent of the impact. Soil samples from the fill area will be collected. Simple direct push methods can be used to collect samples and EPA Test Method 8015 Total Petroleum Hydrocarbons – Diesel Range Organics should be used, as it is appropriate for identifying petroleum that has not yet degraded into its constituents. Groundwater depth, flow direction, and velocity will be obtained by installing wells in a triangular formation and taking measurements. Samples of the groundwater should be tested for evidence regarding whether petroleum has leached into the groundwater.

b. Second, Burns shall, working closely with WVDEP, develop a remediation plan in compliance with the recitations above. In other words, Burns' remediation plan will include the removal of some saturated soils. The parties agree to discuss whether the soils should be taken to a proper disposal facility off-site or whether the soils may be moved to another location on the Burns' property and become part of a properly constructed bio-pile remediation system. After the completion of soil removal, Burns will establish a monitoring schedule in compliance with the recitations above. A No Further Action Required Letter may be granted after six consecutive non-detect sampling events. However, the parties acknowledge that the complete site characterization referred to in Paragraph 2.a. above may reveal that other remediation methods may be effective at this site and may be more prudent or practical to implement than excavation. Therefore, the parties agree to review the complete site characterization and agree upon a final remediation plan for this site. Furthermore, the parties also agree to discuss the possibility of the site entering the Voluntary Remediation Program, if the complete site characterization reveals that the site may be a good candidate for participation in that program.

OTHER PROVISIONS

1. Burns hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia. Under this Order, Burns agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, Burns does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding Burns other than proceedings, administrative or civil, to enforce this Order.

2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.

3. If any event occurs which causes delay in the achievement of the requirements of this Order, Burns shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused by or contributed to by the lack of sufficient funding. Within three (3) working days after Burns becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Burns intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of Burns (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements here. The determination of the Director shall be final and not subject to appeal.

4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving Burns of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject Burns to additional penalties and injunctive relief in accordance with the applicable law.

5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.

6. This Order is binding on Burns, its successors and assigns.

7. This Order shall terminate upon Burns' notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

John B. Burns

John Burns, President
Burns Motor Freight, Inc.

9/9/2016
Date

Public Notice begin:

_____
Date

Public Notice end:

_____
Date

Scott G. Mandirola, Director
Division of Water and Waste Management

Date